IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 802

MASSACHUSETTS MUTUAL LIFE INSURANCE CAMPANY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROSCOE ANDERSON,
208 North Broadway,
St. Louis 2, Missouri,
Attorney for Petitioner.

Of Counsel:
JOHN F. HANDY,
Massachusetts Mutual Life Insurance Co.,
Springfield, Massachusetts,
W. R. GILBERT,
208 North Broadway,
St. Louis 2, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

Textbook Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. .....

MASSACHUSETTS MUTUAL LIFE INSURANCE CAMPANY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Massachusetts Mutual Life Insurance Company respectfully prays that a writ of certiorari issue to review the judgment entered October 30, 1945, by the Circuit Court of Appeals for the Eighth Circuit (R. p. 229) and from the Order Denying Petition for Rehearing entered by that court November 28, 1945 (R. p. 265).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA Sec. 347, 8 F. C. A. Title 28, Sec. 347), the provisions of which are made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 USC Sec. 79a et seq.).

QUESTIONS PRESENTED.

(1) Whether the Circuit Court of Appeals in considering the possibility of alleged potential bankruptcy in determining what is fair and equitable did not commit error in conflict with the decision of this Court in Case v. Los Angeles Lumber Co., 308 U. S. 106, 123, where this Court said:

> "The fact that bondholders might fare worse as a result of foreclosure and liquidation than they would be taking a debtor's plan under Sec. 77B can have no relevant bearing on whether a proposed plan is 'fair and equitable' under that section. Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition would not only drastically impair the standards of 'fair and equitable' as used in Sec. 77B; it would pervert the function of the Act."

(2) Whether the Circuit Court of Appeals erred in failing to reverse the District Court because the District Court did not resolve the dispute as to whether or not the lien of the 1919 Bondholders extended to the electric properties since the District Court considered the question a "collateral issue" and whether such failure is not in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S.

523, where the District Court had not undertaken to resolve a dispute as to the extent of a lien and this Court said:

> "Here as in the Consolidated Rock Products Co. case the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute."

(3) Whether the Circuit Court of Appeals misconstrued and misapplied the absolute priority doctrine in conflict with the decisions of this court, particularly in that the Circuit Court of Appeals found that "the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments," and in that it affirmed the position of the District Court and the Commission "that the mortgage clause providing for redemption payments is not applicable" and in that it affirmed the District Court in finding that the fair equivalent of the claims of the 1919 bondholders was 100 without any allowance to these bondholders for the loss of their senior rights?

(4) Whether the holding of the Circuit Court of Appeals that the standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 as follows "To require * * * that each registered holding company and each subsidiary company thereof, shall take such **steps** as the Commission shall find **necessary** * * *" does not require payment of the premiums on the 1919 Bonds of Laclede Gas where Laclede Gas has sufficient funds to pay such premiums (and such funds have been deposited in escrow for that purpose depending on this appeal) for the reason the standard of necessity "is not applicable to the details of the plan,"

is not an erroneous construction of the statute and a decision of federal law which has not been previously settled?

(5) Whether the holding of the Circuit Court of Appeals that the term "security holders" as used in that portion of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 which reads "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company * * *" can apply "only to security holders continuing as such in the reorganized corporation" and not to security holders existing prior to the consummation of the reorganization plan, is not an erroneous construction and application of the statute and a decision of federal law which has not been previously settled?

(6) Whether the holding of the Circuit Court of Appeals construing Section 26 (c) of the Public Utility Holding Company Act of 1935 as making illegal the contractual provision for redemption premiums and concluding that, therefore, the 1919 Bondholders should be paid nothing above face value and accrued interest is not an erroneous construction and application of the Act as applied to a continuing operating utility and a decision of federal law which has not been previously settled?

(7) Whether the Circuit Court of Appeals erred in failing to reverse the judgment of the District Court because that Court did not independently determine whether the plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act as required by Section 11 (e) of the Public Utility Holding Company Act but instead accepted the findings of the

Commission on these questions as conclusive and going so far as to say "Orders otherwise beyond the power of the Commission become valid when based upon appropriate findings by the Commission"?

(8) Whether the Circuit Court of Appeals erred in failing to reverse the District Court for finding as a Conclusion of Law that "The Commission's order of May 20, 1943, under Section 11 requiring Laclede Gas to recapitalize and substantially reduce its debt and requiring Ogden to divest itself of its interests in Laclede Gas and Laclede Electric, * * * is not reviewable by this Court because under Section 24 (a) of the Act such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired," and in finding that said order of May 20, 1943, is final for the reason that such conclusion is in conflict with decisions by Circuit Court of Appeals for the Third Circuit in Lownsbury et al. v. SEC, 151 F. (2d) 217, and in Commonwealth and Southern Corp. v. S. E. C., 134 F. (2d) 747, and by the Circuit Court of Appeals for the Second Circuit in Okin v. SEC, 145 F. (2d) 206?

STATUTES INVOLVED.

Sections 11 (b) (2), 11 (e), 24a and 26 (c) of the Public Utility Holding Company Act of 1935 [15 U. S. C. A., secs. 79k (b) (2), 79k (e), 79x and 79z (c), August 26, 1935, c. 687, Title I, Sections 11 (b) (2), 11 (e), 24a and 26 (c), 49 Stat. 820, 834, 835], are involved. They are as follows:

> 11 (b) (2) "To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company sys-

tem does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

* * * * * * *

11 (e) "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this

chapter, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

* * * * * * *

"24 (a) Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part * * *."

* * * * * * *

26 (c) "Nothing in this chapter shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this chapter, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of

which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this chapter or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien. Aug. 26, 1935, c. 687, Title I, § 26, 49 Stat. 835."

STATEMENT.

The Massachusetts Mutual Life Insurance Company, a bondholder and creditor of the Laclede Gas Light Company, filed objections in the United States District Court for the Eastern District of Missouri to a plan of reorganization of Laclede Gas Light Company initiated before and approved by the Securities and Exchange Commission under Sections 11 (b) (2) and 11 (e) of the Public Utility Holding Company Act of 1935 [Aug. 26, 1935, c. 687, Title I, § 11, 49 Stat. 820, 15 U. S. C. A., § 79k] insofar as said plan of reorganization provided that the 1919 bonds of The Laclede Gas Company should be retired without the payment of redemption premiums payable under the terms of the 1919 bonds and the mortgage securing said bonds.

The Laclede Gas Light Company (hereinafter referred to as "Laclede Gas") is a Missouri corporation, incorporated by a special act of the Missouri Legislature on March 2, 1857. It is engaged in the manufacture of gas, the distribution and sale of mixed, manufactured and natural gas, and the distribution and resale of natural gas (for industrial purposes only), all within the corporate limits of the City of St. Louis, Missouri (R. p. 12).

The security structure of Laclede Gas (as of December 31, 1943) was as follows (R. p. 13):

On April 1, 1904, Laclede Gas executed a mortgage to secure an issue of $20,000,000 refunding and extension mortgage 5% gold bonds due April 1, 1934. $10,000,000 of these bonds were held under a subsequent mortgage executed in 1919 (R. p. 16), and $8,961,105 of these bonds, which were extended to April 1, 1945 (R. p. 13), were publicly owned.

There was outstanding $17,500,000 of bonds of Series "C" (due February 1, 1953) and $5,500,000 of bonds of Series "D" (due February 1, 1960) of the First Mortgage Collateral and Refunding 5½% Gold Bonds (herein referred to as the "1919 Bonds") issued under the mortgage executed by Laclede Gas on January 1, 1919 (R. p. 13). The mortgage securing the 1919 Bonds provides that such bonds "may be redeemed by the Company at any time at par and accrued interest and such premiums, if any, as the Board of Directors may determine at the time of the issuance of said bonds" (R. p. 42). There is no other provision for acceleration of maturity. The redemption premium on the Series C bonds due 1953, outstanding in the principal amount of $17,500,000 is 2% during 1944, and the premium on the Series D bonds outstanding in the principal amount of $5,500,000 is 4% during 1944, aggregating $570,000 (R. p. 42). It is the payment of these redemption premiums that is involved in this appeal.

In 1935 Laclede Gas issued collateral trust 6% notes in the amount of $3,000,000, $1,000,000 of which have been retired and the remaining $2,000,000 of the notes extended to August 1, 1945 (R. p. 16).

There was outstanding 23,330 shares of 5% cumulative preferred stock of $100 par value, on which there was an arrearage of $50.83 per share (R. p. 13). There was also outstanding 107,000 shares of common stock, par value $100 (R. p. 13).

Laclede Power & Light Company (hereinafter referred to as Laclede Electric), a Missouri corporation organized

in 1926, is an electric utility company engaged in the generation, transmission and sale of electric energy within the corporate limits of the City of St. Louis, with a line crossing Mississippi River to Granite City, Illinois, for a very minor part of its property. A part of its facilities is leased from Laclede Gas under an agreement entered into in 1926 and expiring in 1953 (R. p. 13). The trustee of the 1919 Bonds of Laclede Gas has taken the position for many years that the electric properties of Laclede Electric are security for the 1919 Bonds (R. p. 32). In 1936 Laclede Electric commenced suit against the trustees under 1904 and 1919 mortgages of Laclede Gas for a declaratory judgment to exclude the addition it had made to Laclede Gas' electric properties from the lien of said mortgages. After the trustees in said mortgages filed their answers, Laclede Electric dismissed the suit (R. pp. 194-195).

Laclede Electric had, as of December 31, 1943, 35,993 shares of no par value common stock outstanding (R. p. 14). It had issued no mortgage, but had a 6% demand note in the amount of $705,000 and an open account debt of $200,000 both with the Ogden Corporation (R. p. 14).

Ogden Corporation (referred to as Ogden) is a registered holding company under the Public Utility Holding Co. Act of 1935, and a Delaware corporation. Ogden is the parent of Laclede Gas, Laclede Electric and numerous other utility and non-utility companies (R. p. 14).

As of December 31, 1943, Ogden owned the following interests in Laclede Gas: Ogden owned 73.51% of Laclede Gas' outstanding voting securities. Such voting securities consist of 5,345 shares, or 29.9% of the 23,330 outstanding shares of the 5% cumulative preferred stock, par value $100, and 90,466 shares, or 84.5% of the 107,000 outstanding shares of common stock, par value $100. Ogden also owned all the collateral trust 6% notes extended to August 1, 1945, outstanding in the principal amount of $2,000,000, and $200 principal amount of the 1919 Bonds (R. p. 14).

Ogden owned 35,727 shares of the common stock, or 99.2% of the 35,993 outstanding shares, a 6% demand note in the amount of $705,000, and an open account debt of $200,000, of Laclede Electric (R. p. 15).

Ogden came into being as a result of a plan of reorganization, pursuant to Section 77B of the Bankruptcy Act as amended, of Utilities Power & Light Corporation (herein called "Utilities"), a registered holding company, which was formerly parent of Laclede Gas and Laclede Electric (R. p. 14). The plan filed by "Utilities" and approved in the reorganization proceedings and approved by the Securities & Exchange Commission (sometimes herein referred to as "Commission") provided that Ogden would acquire the securities of Laclede Gas and Laclede Electric and other assets of Utilities, register as a public utility holding company under the Act, and then convert itself into an investment company as distinguished from a public utility holding company through the sale or other disposal of the Laclede Gas and Laclede Electric securities and other utility and holding company securities acquired by it from Utilities (R. pp. 198-199).

On September 4, 1941, Ogden, Laclede Gas and Laclede Electric voluntarily filed a Section 11 (e) plan under the Act (R. p. 4). On February 27, 1943, Ogden and all of its subsidiaries filed a plan under Section 11 (e) of the Act (R. p. 200). On March 22, 1943, the Commission instituted a mandatory proceeding against Ogden and all of its subsidiaries under Sections 11 (b) (1), 11 (b) (2), 15 (f) and 20 (a) of the Act (R. p. 200). These three proceedings were consolidated (R. p. 200) and out of the consolidated proceedings came an order of May 20, 1943 (R. pp. 85-89), which directed Ogden to eliminate itself as a public utility holding company. Laclede Gas was directed to recapitalize "so as to distribute voting power fairly and equitably among the security holders" and to include in the recapitalization a substantial reduction in its

debt, the elimination of preferred stock arrears, and the conversion of the outstanding preferred and common stock into a single class of stock. The order did not direct or mention the retirement of the Laclede Gas Bonds, or any method of reducing the debt.

The voluntary plan filed by Laclede Gas, Ogden and Laclede Electric on September 4, 1941, underwent a number of amendments up to January 24, 1944 (R. pp. 4-6). The Commission finally held hearings (R. p. 5) on the plan as so amended. The plan so amended provided in substance (R. pp. 21-22):

> "1. Sale of the electric properties operated by Laclede Electric, including properties leased from Laclede Gas, to Union Electric, at a base sale price of $8,600,000, and allocation of $2,200,000 of such sales price of Laclede Gas as its share of such proceeds of sale;
>
> "2. Transfer to Laclede Gas by Laclede Electric of its remaining assets (except cash and the 233,112 voting trust certificates of Granite City Generating Company, which certificates are to be transferred to Ogden) estimated, as of December 31, 1943, at approximately $14,300 and the dissolution of Laclede Electric, after the discharge of its liabilities;
>
> "3. Issuance of eleven shares of new common stock of Laclede Gas, $4 par value per share, in exchange for each share of present 5% Cumulative Preferred Stock, $100 par value, of Laclede Gas, and the issuance of one share of new common stock of Laclede Gas, $4 par value, in exchange for each share of present common stock of Laclede Gas, $100 par value;
>
> "4. Issuance to Ogden (in addition to 149,261 shares to be received by it in exchange for its present holdings of Laclede Gas preferred and common stocks in the ratio provided for the No. 3 above) of 2,000,000 shares of new common stock of Laclede Gas, $4 par value, in return for:

"(a) Cancellation of $2,000,000 principal amount Collateral Trust 6% Notes of Laclede Gas owned by Ogden, after payment of accrued interest thereon to the effective date of the plan;

"(b) Payment to Laclede Gas by Ogden of $905,000 cash;

"(c) Payment to Laclede Gas of Laclede Electric's share of the cash proceeds from the sale of the electric properties, less such portion of such proceeds necessary to discharge in full all liabilities of Laclede Electric not assumed by Union Electric: such payment to Laclede Gas is estimated to be $6,175,000 as of May 31, 1943;

"(d) Assets transferred to Laclede Gas by Laclede Electric as provided in paragraph No. 2 above;

"It is provided in the plan that if the cash payment mentioned in (c) above falls below $5,975,000, the number of shares issuable to Ogden will be decreased by a number of shares which, in the opinion of the proponents of the plan, will fairly compensate for any such decrease in the amount of cash to be received by Laclede Gas; or, if Ogden so elects, it will pay to Laclede Gas in cash a sum sufficient to increase to $5,975,000 the amount of cash to be received by Laclede Gas. The maximum cash payment to Laclede Gas is to be $6,175,000. Any cash remaining in Laclede Electric's treasury after such maximum payment thereof is to be distributed pro rata to the stockholders of Laclede Electric.

"5. Payment by Ogden to the minority holders of the stock of Laclede Electric, upon surrender for cancellation of such stock of a cash amount equal to their prorate share in the net assets of Laclede Electric after the consummation of the sale, and after payment to Laclede Gas of its share of the proceeds of such sale $2,200,000;

"6. Sale by Laclede Gas of $19,000,000 principal amount of new first mortgage bonds and $3,000,000 principal amount of serial debentures, and the use

of the proceeds together with other available cash, as hereinafter in paragraph 7 set forth;

"7. Payment and discharge, at the principal amount thereof, together with accrued interest thereon to the effective date of the plan, of Laclede Gas 1904 5% Bonds outstanding in the hands of the public, and its outstanding 1919 5½% Bonds aggregating $31,961,105 principal amount, as of December 31, 1943;

"8. Sale by Ogden of all of the new common stock, which it will acquire by virtue of Laclede Gas' reorganization to the public."

On May 24, 1944, the Commission entered its findings and opinion (R. pp. 8-58), in which it found the plan necessary to effectuate the provisions of Section 11 (b) (R. p. 24) and found that the plan would be fair and equitable (R. pp. 39, 43) to the persons affected thereby if it were modified to provide (in addition to certain incidental modifications) that the holders of the 5% Preferred stock of Laclede Gas receive 14 rather than 11 shares of the new common stock of Laclede Gas, in exchange for each share of such preferred stock and accumulated unpaid dividends thereon (R. p. 37).

The suggested modifications were made by amendment to the Plan and on May 27, 1944, the Commission issued its order (R. p. 67) approving the plan, conditioned upon an enforcement order by a District Court proceeding. The language used is as follows (R. p. 71):

"That this order shall not be operative to authorize the consummation of transactions proposed in the plan as amended until an appropriate federal district court shall, upon application thereto, enter an order enforcing such plan."

Some of the findings of the Commission which are pertinent in this appeal are as follows (R. p. 15):

"The comprehensive proposals before us for the reorganization of Laclede Gas and the sale of the electric properties operated by Laclede Electric are necessitated by a number of pressing financial problems facing the applicants. These problems relate to Laclede Gas' excessive debt and to the impending maturity in 1945 of a substantial portion of such debt, the inability of Laclede Gas since 1933 to pay any dividends on its outstanding preferred and common stocks, the need to sell the electric properties operated by Laclede Electric in order, among other things, to raise funds to reduce Laclede Gas' excessive debt, Ogden's obligations under Section 11 (b) (1) of the Act to dispose of its interests in Laclede Gas and Laclede Electric, the presence of large amounts of inflationary items in Laclede Gas' asset accounts, and the inequitable distribution of voting power existing among Laclede Gas' security holders. These and other related problems facing the applicants are summarized below."

The Commission found (R. p. 35) that there were "possibilities of bankruptcy" of Laclede Gas and that if bankruptcy would occur the 1919 bonds would be accelerated and that the claim of the 1919 Bondholders "would be measured by the principal amount, exclusive of redemption premium." The Commission found that the dispute as to whether the lien of the 1919 bonds extended to the electric properties should be eliminated to enable Ogden to solve its problems (R. p. 45).

As to the fairness and equitableness of the proposed plan to the stockholders of Laclede Gas, the Commission found that both the preferred and common stock in their then present condition were in non-marketable form, that dividends had not been paid since 1933 (R. p. 17) and that, absent reorganization, would not be paid "for many years to come" (R. p. 17). On the basis of the plan (as required to be amended) the Commission found that "the reason-

ably prospective earnings per share of new common stock would be 37¢ to 41.1¢. On this basis, each share of preferred would have applicable to it between $5.18 and $5.75 of reasonably prospective earnings, as compared with its "annual $5.00 dividend preference" (R. p. 37). The Commission concluded, "There is little question that, as an investment, fourteen shares of such new common stock are, in fact, superior to one share of the present preferred stock whose holder has been forced and, absent reorganization, * * * will be forced to forego any return on his security for many years. Similarly, it is our opinion that the new common stock of the reorganized company provides the present common stockholder with a security of a caliber substantially superior to that of his present security" (R. p. 39).

As to the relationship between the preferred and common stock inter sese, the Commission found that the preferred stock had no liquidating preference over the common stock (R. pp. 33-34). The Commision concluded: "We are of the opinion, however, that under the circumstances of the present case and where the common stock is permitted to participate on a substantial basis as compared with the preferred, fairness requires that the reasonably prospective earnings applicable to the participation accorded the preferred stock should not be less than the preferred's present priority upon earnings" (R. p. 36).

As to the retirement of the 1919 Bonds without the payment of the redemption premiums, the Commission concluded that "the retirement of the 1919 bonds is a proximate result of the necessity of reducing Laclede Gas' indebtedness, and the sale of the electric properties to raise the cash necessary for that purpose" (R. p. 44). It also stated that a "solution of Ogden's problems" necessitated the retirement of the 1919 bonds (R. p. 45). The Commission stated that the "method of retiring all of the

1919 bonds may not be the only possible method to prevent a windfall and insure that the 1919 bonds will not receive unduly favorable treatment at the expense of the stockholders" (R. p. 44). The Commission concluded "that the retirement of the 1919 bonds by Laclede Gas is not primarily ascribable to a desire on the part of Laclede Gas stockholders to obtain cheaper money but is attributable to the requirements of Section 11 (b), and that, therefore, the premium as such is not payable. We also find that payment of principal amount and accrued interest to the effective date of the plan * * * is the fair equivalent of the rights of the 1919 bondholders and that, therefore, such payment would be fair and equitable" (R. pp. 42-43).

As to Ogden, the Commission concluded (R. pp. 38-39): "It appears plain that the plan confers distinct benefits upon Ogden in converting its non-marketable investments in the Laclede companies into marketable securities with substantial applicable earnings and immediate dividend prospects."

The Commission applied (R. p. 3) to the United States District Court for the Eastern District of Missouri for an order to enforce and carry out the plan as provided in Section 11 (e) of the Act. Order was entered requiring objections to be filed on June 27, 1944, and hearing was set for June 30, 1944 (R. p. 89). Appellant and other objectors filed written objections (R. p. 90 et seq.), raising only matters appearing on the face of the findings, opinion and order of the Commission. Hearing was had on June 30, 1944, and July 1, 1944 (R. p. 97).

RULINGS OF THE COURT BELOW.

The District Court filed its statement, opinion, findings of fact and conclusions of law on August 25, 1944 (R. pp. 98-135), in which the Court accepted as conclusive on it the Commission's determination that the plan was fair and equitable and appropriate to effectuate the provisions

of Section 11 of the Act, and made other rulings not necessary to set out here, and directed an order be entered to enforce the provisions of the plan (R. p. 135). No such order was entered, as Laclede Gas, Laclede Electric and Ogden applied to the Court for leave to amend the plan so as to enable the plan to be consummated at the earliest possible date without waiting for an appeal to determine the rights of objecting bondholders (R. pp. 137-139). The application was granted, and December 4, 1944, was set for hearing on application to enforce the amended plan approved by the Commission and objections were required to be filed by December 4, 1944 (R. p. 136). The proponents submitted a plan (R. p. 154 et seq.) (known as Amended Plan of November 16, 1944), to the Commission, which provided, in effect (R. pp. 168-170), that Laclede Gas would deposit in escrow with the Trustee of the 1919 mortgage a sum sufficient to cover (1) the aggregate amount of the premiums that would be payable under the terms of the 1919 mortgage in the event the 1919 bonds were redeemed pursuant to the terms of the mortgage on the effective date of the Amended Plan, (2) interest for a period of three years, at the rate of 5½% per annum on the amount of the premiums, and (3) an amount sufficient to defray reasonable fees and expenses of the Trustee in connection with the escrowed funds. In the event that a final judicial determination should hold that the premiums on the 1919 bonds should be paid, then the premiums would be paid from the escrowed fund to the 1919 bondholders, together with interest on the amount of the premiums, at the rate of 5½% per annum from the effective date of the Amended Plan to the date when the funds became available for payment of the premiums. If it should be determined that the premiums are not payable, then the escrowed funds (less Trustee expense and fees) would be returned to Laclede Gas. The Amended Plan also

provided that holders of the 1919 bonds could accept payment of the principal and interest on their bonds without waiving their right to be paid the premiums and interest thereon in the event that a final judicial determination required payment of the premiums.

On December 2, 1944 (R. p. 152), the Commission approved the plan as amended November 16, 1944. Appellant and others filed written objections, raising only matters appearing on the face of the findings, opinion and orders of the Commission. Hearing was had on December 4, 1944, and on that date (R. pp. 170-177) the District Court entered its Supplemental Findings of Fact and Conclusions of Law (R. p. 177), and Order No. 1 (R. p. 185) and Order No. 2 (R. p. 182) approving the plan. Order No. 1 dealt with the features of the plan other than the retirement of the 1919 bonds and the payment of the redemption premiums thereon; this was specifically excluded from Order No. 1 (R. p. 188).

Order No. 2, which the order appealed from, decreed, in paragraph (1) (R. p. 184), that subparagraph (c) of paragraph 12, of Article I of the Amended Plan, providing for the retirement of the 1919 bonds without the payment of the redemption premiums, was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act.

Part of this Order not appealed from (paragraph 2) (R. pp. 184-185) provides that any of the bondholders had the right to appeal from said Order No. 2, and that a determination, on the appeal by any bondholder, that subparagraph (c) of paragraph 12 of Article I of said Amended Plan was not fair and equitable or not appropriate to effectuate the provisions of Section II of the Act would be binding as to all bondholders and that all bondholders would then be entitled to the premiums and interest thereon from the escrowed deposit.

In its opinion, findings of fact and conclusions of law,

the District Court found that the retirement of the 1919 bonds, without the payment of premiums, was not a voluntary retirement, but was attributable to Section 11(b) of the Act and that, therefore, the premiums were not payable, that the Commission's findings that the payment of the 1919 bonds at the principal amount of the bonds with accrued interest to effective date of the plan without the payment of premiums was the fair equivalent of the rights of the 1919 bondholders was supported by substantial evidence and was "conclusive" upon the Court (Conclusions of Law, VII and VIII, R. p. 134), that "The Commission found the plan was 'entirely appropriate' to comply with its orders. These are matters peculiarly within the discretion and powers of the Commission, and if based on evidence, we deem this court bound by the finding" (R. p. 113), that the order of May 20, 1943, "is not reviewable by this court because, under Section 24(a) of the Act such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired" (Conclusions of Law, IX, R. p. 133), and "Let not the effect on this case of the finality of the findings and order in the consolidated case be overlooked * * * no appeal having been taken by them in the consolidated case and time for appeal having expired, it is a matter of serious doubt whether they are now in a position to complain of findings and orders in the consolidated case, which are now in this case if made to carry out the provisions of the order made by the Commission in the consolidated case". (R. p. 110.) That the issue of whether or not the lien of the 1919 bonds extended to the electric properties was a "collateral issue" and "certainly this court can not now try that collateral issue" (R. p. 114), that the possibility of bankruptcy, absent reorganization, is a factor in determining fairness and equitableness (R. pp. 115-116), that "Orders, other-

wise beyond the powers of the Commission, became valid when based upon appropriate findings by the Commission" (R. p. 121), that Section 26 (c) of the Act did not apply where bonds were called "involuntarily" by force of the Act (R. pp. 121-125).

The Circuit Court of Appeals for the Eighth Circuit affirmed (R. p. 220) the judgment of the District Court on October 30, 1945, (Petition for Rehearing denied November 28, 1945 [R. p. 265]), with the opinion being written by Judge Thomas, in which it was stated, "Since there is a 'rational basis' in fact for the finding of the Commission and no 'clear-cut' error of law by either Commission or court, we are not inclined to disturb the conclusion that retirement of the bonds at principal and accrued interest amounts to the 'equitable equivalent of the rights surrendered' ". (R. p. 216.) The Circuit Court of Appeals approved the use of alleged potential bankruptcy as a factor in determining fairness (R. p. 215), the conclusion that the call premiums are "neither a factor in nor a measure of a fair amount to be paid the bondholders on retirement of their bonds" (R. p. 215). It further held that "The due date fixed in the contract in this case can not be urged, * * *, as the basis for a claim for interest payments" (R. p. 216), that the term "security holders" in the exception clause in Section 11(b) (2) of the Act providing that the corporate structure of an operating company can be changed only for the purpose of "fairly and equitably distributing voting power among the security holders" applies only to those who "continue to be security holders after the plan is put into operation", and not to those who were security holders up to the time of the consummation of the plan, when they were eliminated (R. p. 218), that the standard of necessity required by Section 11(b) (2) of the Act "is not applicable to the details of the plan" such as the question of the necessity of retiring the bonds without payment

of premiums where the Company had sufficient funds to make such payments (R. p. 214).

REASONS FOR GRANTING.

(1) The Circuit Court of Appeals held that the possibility of bankruptcy of Laclede Gas Light Company was a factor to be considered in determining what was the fair and equitable equivalent of the rights of the 1919 Bondholders of the Laclede Gas Light Company. In Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123, this Court said:

> "The fact that bondholders might face worse as a result of foreclosure and liquidation than they would be taking a debtor's plan under Sec. 77B can have no relevant bearing on whether a proposed plan is 'fair and equitable' under that section. Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition would not only drastically impair the standards of 'fair and equitable' as used in Sec. 77B; it would pervert the function of the Act."

In Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, this court stated that the term "fair and equitable" in the Public Utility Holding Company Act incorporates the principle of full priority and cites Case v. Los Angeles Lumber Products Co., supra, as an application of this doctrine. The decision of the Circuit Court of Appeals is probably in conflict with that applicable decision of this Court.

(2) The District Court did not resolve the dispute as to whether or not the lien of the 1919 bondholders of Laclede Gas Light Co., extended to the electric properties because it considered that question to be a "collateral issue." The Circuit Court of Appeals did not reverse the District Court for this failure to resolve the dispute. In Group of

Institutional Investors v. Chicago, M., St. P. & P. Ry., 318 U. S. 523, where a District Court had not undertaken to resolve a dispute as to the extent of a lien, this Court in applying the principle of full priority said:

> "Here as in Consolidated Rock Products Co. case the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute."

The full priority principle applied in the Group of Institutional Investors case, supra, has been held by this Court in Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, to apply to proceedings under the Public Utility Holding Co. Act. The decision of the Circuit Court of Appeals probably is in conflict with that applicable decision of this Court.

(3) The Circuit Court of Appeals, while stating that the 1919 Bondholders should receive "the equitable equivalent of the rights surrendered" nevertheless found that "the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments," affirmed the position of the District Court and the Commission "that the mortgage clause providing for redemption is not applicable," and affirmed the District Court in finding that the fair equivalent of the claims of the 1919 Bondholders was 100. In applying the full priority principle, this Court said in Group of Institutional Investors v. Chicago, M., St. P. & P. Ry. Co., 318 U. S. 523: that Bondholders " 'must receive, in addition, compensation for the senior rights which they are to surrender' * * * the Commission and the District Court should determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old one, as equitable compen-

sation, qualitative or quantitative for the loss of their senior rights." The full priority principle applies to this proceeding under the Public Utility Holding Company Act. The decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court establishing the full priority doctrine.

(4) The Circuit Court of Appeals construed the standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act (Aug. 26, 1935, c. 687, Title I, Sec. 11, 49 Stat. 820, 15 U. S. C. A. 79k) authorizing the Securities and Exchange Commission "to require * * * that each registered holding company and each subsidiary company thereof, shall take such **steps** as the Commission shall find **necessary** * * *" as not to apply "to the details of the plan" and held that that section did not require payment of redemption premiums on the 1919 bonds of Laclede Gas Company even though Laclede Gas continued as going operating utility and the Company had sufficient funds to pay such premiums and the plan required such funds to be deposited in escrow. This Court has not yet construed the application of the standard of necessity provided in Section 11 (b) (2) of the Act. The case involves a decision on an important question of federal law not decided by this Court.

(5) The Circuit Court of Appeals construed the exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 (Aug. 26, 1935, c. 687, Title I, Sec. 11, 49 Stat. 820, 15 U. S. C. A. 79k) providing that "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company * * *" to apply "only to security holders continu-

ing as such in the reorganized corporation" and not to security holders existing in the company up to the time of the consummation of the reorganization plan. This court has not yet construed the exception clause of Section 11 (b) (2) of the Act. The case involves a decision on an important question of federal law affecting thousands of investors not decided by this Court.

(6) The Circuit Court of Appeals construed Section 26 (c) of the Public Utility Holding Company Act of 1935 (Aug. 26, 1935, c. 687, Title I, Sec. 26, 49 Stat. 835) as making illegal the contractual provision for redemption premiums and concludes that, therefore, the 1919 Bondholders should be paid nothing above face value and accrued interest. This court has not yet construed the application of Section 26 (c) to a continuing operating utility. This involves a decision on an important question of federal law which has not but should be settled by this Court.

(7) The District Court did not independently determine whether the reorganization plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935 (Aug. 26, 1935, c. 687, Title I, Sec. 11, 49 Stat. 820, 15 U. S. C. A. 79k) as required by Section 11 (e) of that Act but instead accepted the findings of the Commission on these questions as conclusive upon it and the District Court went so far as to say "Orders otherwise beyond the power of the Commission become valid when based upon appropriate findings by the Commission." The Circuit Court of Appeals did not reverse the District Court for failing to determine independently this question. This Court has not yet construed Section 11 (e) as to the requirement of independent determination of whether a plan is fair and equitable and appropriate to effectuate the provisions of the Act. This Court has not yet construed that

section as applied to an operating company. The case involves a decision of an important question of federal law not decided by this Court.

(8) The Circuit Court of Appeals did not reverse the District Court for finding that "The Commission's order of May 20, 1943 under Section 11 requiring Laclede Gas to recapitalize and substantially reduce its debt and requiring Ogden to divest itself of its interests in Laclede Gas and Laclede Electric, * * * is not reviewable by this court because under Section 24 (a) of the Act such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired" and in finding that said order of May 20, 1943 is final on the issues here involved.

The Circuit Court of Appeals for the Third Circuit in Lownsbury et al. v. Securities & Exchange Commission, 151 F. 2d 217, held that divestment orders were interlocutory orders which were not reviewable under Section 24 (a) of the Act, but were only reviewable in an enforcement proceeding under Section 11 (e) and the same ruling is found as to a simplification order in Commonwealth & Southern Corp. v. Securities & Exchange Commission, 134 F. 2d 747. A conflict exists between the Circuit Court of Appeals for the Eighth Circuit on the one hand, the Sixth and the Third Circuits on the other hand, as well as the Second Circuit as pointed out in the Lownsbury case as agreeing with the Third Circuit.

CONCLUSION.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this court for its review and deter-

mination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Court of Appeals for the Eighth Circuit be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ROSCOE ANDERSON,
208 N. Broadway,
St. Louis 2, Missouri,
Attorney for Petitioner.

Of Counsel:

JOHN F. HANDY,
Massachusetts Mutual Life Insurance
Co., Springfield, Massachusetts.

W. R. GILBERT,
208 N. Broadway,
St. Louis 2, Missouri.